113 of the Criminal Procedure Code: see the *locus classicus* on this point, *Lee Lian* v. *Public Prosecutor*;[1] also *Nagalingam* v. *Public Prosecutor;* [2] *Meelamchan* v. *Public Prosecutor.*[3]

On the prosecution evidence, therefore, the accused could have had nothing more to do with the offending machine than any other customer or invitee of the shopkeeper, whoever such person might be.

The conviction is quashed and the sentence set aside. I direct that the fine be refunded or, in case he be in prison for default in paying the fine, that he be released forthwith.

Conviction quashed; sentence set aside.

ENG AH KOW v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Thye Ag.C.J.) November 4, 1965]

[K.L. — Selangor Criminal Appeal No. 62 of 1965]

Penal Code, ss. 420 & 511 — Attempted cheating — Confidence trick.

Requiring money and asking for it *per se* is not cheating unless there was a dishonest intention to cause wrongful loss.

CRIMINAL APPEAL.

Dato' R. P. S. Rajasooria (*R. P. S. Rajasooria Jr.* with him) for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Ong Hock Thye Ag.C.J.: The appellant was originally charged in the sessions court, Kuala Lumpur as follows:

"That you on 1.6.65 at about 5.30 p.m. at room No. 506 Federal Hotel, in the District of Kuala Lumpur, in the State of Selangor, attempted to cheat one Selvarasan s/o Thampoe, and in such attempt did a certain act towards the commission of the said offence to wit, by issuing him an account closed cheque from United Chinese Bank Ltd. Hongkong bearing No. F. 68977 for HK. $3,200 and trying to induce him to give you a sum of $600, and that you have thereby committed an offence punishable under section 420 and section 511 of the Penal Code."

Counsel for the defence then raised certain preliminary objections to the charge which, in the opinion of the president, were unwarranted and therefore overruled. The trial was then adjourned to August 16, 1965, on which date the prosecuting officer, applied for an amendment of the charge by substituting "no balance of fund remained" for "account closed". The charge was accordingly amended to read as follows:

"That you on 2.6.65 at about 11.00 a.m. at room No. 506, Federal Hotel, in the District of Kuala Lumpur, in the State of Selangor, attempted to cheat one Selvarasan s/o Thampoe an advocate and solicitor, by dishonestly issuing him a cheque No. F. 68977 for $3,200 (Hongkong dollars) drawn on the United Chinese Bank Ltd. Hongkong as a deposit for the professional services of the said Selvarasan s/o Thampoe and as an intended cash loan for $1,200 (Hongkong Dollars) from him, and that when your cheque was presented for payment it was found the cheque was dishonoured as no balance of fund remained, and that you thereby committed an offence punishable under section 420 and section 511 of the Penal Code."

I do not think the result was any improvement: rather the reverse. Whereas it was clear, in the first place, that the dishonest act charged lay in an attempt to obtain $600 on the strength of a cheque drawn on a non-existent bank account, the amended charge entirely befogged this question. The reference therein to "a deposit for professional services" was irrelevant. The intention to give a loan was not (according to the amended charge) induced by any act necessarily dishonest.

By reason, however, of the provisions of section 422 of the Criminal Procedure Code, I should not have regarded the unfortunate wording of the charge as occasioning a miscarriage of justice since the defence was in no way misled to its prejudice. The confusion in the charge, nevertheless, had led to a confusion of thought on the part of the president who tried the case.

The facts relied on by the prosecution were briefly as follows. The appellant sought an introduction to the complainant, a practising advocate and solicitor of Kuala Lumpur, through a medical practitioner in Malacca. On the pretext that the appellant would be retaining the solicitor for advice and assistance in connection with a claim to a considerable inheritance in Hongkong, the appellant agreed to a certain fee, of which he offered part payment by a cheque drawn on a bank in Hongkong. To the amount thereof was added a sum of $1,200 (Hongkong) equivalent approximately to $600 (Malayan), which the appellant asked to be paid over to him for his immediate purposes. The solicitor's evidence was that he had not the ready money to pay this sum or he would have done so at the time, but he subsequently decided to defer payment till the receipt of advice that the appellant's cheque had been met. This, of course, was the classic type of confidence trick. The professional fee was to serve as a bait to lure the victim into making the payment. The story of the inheritance and the man's actual means would, of course, have been fictitious.

As it turned out, however, the learned president accepted the defence story that the appellant was a man of means whose father, mother and grandfather were millionaires and that he was well able to obtain funds, whenever he needed them, from friends and relatives or business associates. As the president puts it: "I have no reason to doubt that the accused is a widely travelled man, a very intelligent business man brought up in an atmosphere of opulence indeed from the time of his birth, had very rich

parents, good business friends and relatives in high walks of life."

Then, having so found, he went on to say: "I have weighed the evidence . . . very carefully and I found as a fact that the accused did ask P.W.1 for $600 cash with intent to commit the offence of cheating. The accused may be a respectable man, he may not be wanting in good wealthy background with influential relatives and lots of business friends but it is clear to me that he wanted $600 from P.W.1 that day . . . I found the story of P.W.1 has the ring of truth and I did not believe the accused's explanation."

With respect I do not understand this manner of reasoning. Requiring money and asking for it *per se* is not cheating unless there was a dishonest intention to cause wrongful loss. A man of means does not attempt to cheat another of a comparatively paltry sum; certainly, a client would not try to cheat his solicitor whom he hopes to consult and rely on for some time to come. Where was the dishonest intention if the appellant had, or would have, the means to meet the cheque, had he been given the opportunity to do so? On the premises of the facts accepted by him, the president should not have come to the conclusion he did.

I accordingly allow the appeal and quash the conviction. The cross-appeal by the Public Prosecutor has, of course, to be dismissed.

Appeal allowed.

TAN HUA LAM v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Ong Hock Thye Ag.C.J. (Malaya) and Suffian J.) November 8, 1965]

[K.L. — Federal Court Criminal Appeal No. X6 of 1965]

Internal Security Act, 1960, s. 57 — Consorting with members of Indonesian armed forces — Possession of sten gun — Possession of hand grenades — Statement of accused person — Failure to refer to statements of witnesses — Criminal Procedure Code (Cap. 6), s. 113 — Courts of Judicature Act, 1964, s. 60(1).

The evidence showed that the appellant was brought in the company of some armed Indonesian soldiers in an aircraft and that they landed by means of parachutes in Johore. The appellant was arrested the same morning and was found in possession of a sten gun and hand grenades. The evidence against the appellant consisted of the evidence of the Indonesian soldiers in the aircraft, the evidence of his capture and his statement. The appellant was convicted and appealed against his conviction.

Held: (1) the appellant was guilty even though the act of consorting took place in the airspace above the territory of Johore;

(2) on the evidence the appellant had been trained for sabotage work in Malaysia and could not successfully plead that he thought he was on a training exercise and did not know that he was being landed into Malaysia;

(3) although there was no direct evidence that the sten gun in the possession of the appellant was serviceable, the evidence of the prosecution witnesses who were acquainted with firearms could be accepted, in the absence of evidence to the contrary, as showing that the appellant was in possession of a serviceable firearm;

(4) on the facts the statement of the appellant was properly admitted in evidence;

(5) although the learned trial judge was wrong in not examining the statements of the Indonesian soldiers, at the request of the defence counsel and deciding whether copies should be supplied to the defence, this error did not lead to a miscarriage of justice and therefore the case falls within the proviso to section 60(1) of the Courts of Judicature Act.

Cases referred to:—

(1) *Chan Chwen Kong* v. *Public Prosecutor* [1962] M.L.J. 307, 308.

(2) *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149.

(3) *Cotterill* v. *Penn* [1936] 1 K.B. 53.

(4) *Horton* v. *Gwynne* [1921] 2 K.B. 661.

(5) *Chong Kim Seng* v. *Public Prosecutor* [1949] M.L.J. 109, 111.

(6) *Ismail bin Haji Ibrahim* v. *Public Prosecutor* [1949] M.L.J. 138, 140.

(7) *Lim Sing Hiaw* v. *Public Prosecutor* [1965] 1 M.L.J. 85.

FEDERAL COURT.

T. T. Rajah for the appellant.

Nik Saghir bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson L.P.: During the night of 1st/2nd September, 1964, an Indonesian aircraft carrying 48 armed men under the command of Lieutenant Sutikno of the Indonesian Air Force left Medan in Indonesia and flew to Malaysia. Some of the men in the aircraft were members of the Indonesian armed forces, others were Malaysians who were not members of the Indonesian forces. The object of the expedition was sabotage to disrupt the economy of Malaysia.

Shortly after 2 a.m. on the morning of 2nd September the aircraft was over Malaysian territory in the neighbourhood of a land settlement area known as Kampong Tenang, near Labis in the State of Johore and some 40 miles east of the coast, which is within a proclaimed Security Area thus described in the Schedule to the Proclamation of 17th August, 1964 (Legal Notification No: 245 of 1964):—

"The area comprising the territories of the States of Johore, Malacca and Negri Sembilan."

When the aircraft was over Kampong Tenang the party of armed men left it by means of parachutes carrying their arms and ammunition with them and in due course they came to earth. Later the same morning the present appellant, who is a Malaysian, was arrested. He was thought to have been one of the armed men who had left the aircraft by parachute and he was prosecuted on three charges under the Internal Security Act, 1960.

These charges were as follows:—